Attorney Lisa Okolish Miller
Summit County Human Resource Commission
Ohio Building
Akron, Ohio

In the Matter of an Appeal
By David Duncan McCann, Pro Se Appeal Number 0601/0602

Dated August 1, 2006

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Witness List

Appeared Fred Blevins, MA Licensed Professional Clinical Counselor 3618 West Market Street Suite 105 Akron, Ohio 44333

Appeared Debbie Hershfield Licensed Independent Social Worker Ease@Work 3090 West Market Street Suite 106 Akron, Ohio 44333 330-620-2102 330-835-9182 800-521-3273

Appeared Michelle Smith Department of Insurance Office of the Summit County Executive 175 South Main Street Akron, Ohio 44308

Excused Ken Jones CFE, CPA Director Department of Insurance Office of the Summit County Executive 175 South Main Street Akron, Ohio 44308

Denied Lee Fisher, Attorney at Law 15925 Shaker Boulevard Shaker Heights, Ohio 44120

Denied Jim Penman Vice President for Behavioral Health Services Center for Families and Children 4400 Euclid Avenue Cleveland Ohio 44103 216-432-7200

Denied Tracey Hosom Investigator State of Ohio
Counselor, Social Worker & Marriage and Family Therapist Board
77 South High Street 16th Floor Columbus, Ohio 43215-6108

Babb, Dennis	Dougherty,Mary Lou	Lim, Declan	Sloan, Joyce
Baker, George	Finical, Steve	Lloyd, Helen	Smoot, Tommy
Barrickman, John	Fretz, Teri	Lysenko, Shannon	Snyder, Patricia
Baumann. Andy	Frost, James	Marshall, Christine	Soltis, Dale
Bheam, Jennifer	Fullerton, Kristen	McGrath,Jared	Spitali, Chuck
Bickett, Robert	Gainer, Robert	Mendelson, Laurie	Sprouse, Leslie
Briggs, Kasie	Gallick,Robert	Mittiga, Don	Stanley, Craig
Brown, Karen	Garey, June	Murphy, Linda	Strain, Richard
Burskey, Rebecca	Geltz, Russ	Murray, Pamela	Sweeney, Chuck
Chapman, Jay	Gerrow, Barbara	Newlove, Marie	Sweeney, Marianne
Cincurak, Rick	Gradwohl, Barry	Parmatier, Lynn	Ulman, Sharon
Ciraco, Frank	Greer, Sharley	Petranic, Annette	Viall, Cathy
Clark, Keith	Gutowski, Dennis	Piercy, Tina	Wagner, Scott
Cooley, Tari	Hannan, David	Price, James	Warley, Gail
Corbin, Janis	Harshbarger, Ed	Reedy, Vicki	Washington, Shirley
Cummins, Debbie	Harvey, Tom	Reichlin, Joseph	Watson, Ryan
Curry, Michael	Hathaway, Tom	Reitz. Rose	Williams, Bryan
Davis, Robert Lt.	Heilman, Bill	Roszkowski, Sue	Williams, Cynda
Davis, Robert	Hickman, David	Scarlatelli, Bob	Yeager, Lisa
Davis,Wyndi	Holland, Celeste	Schindewolf, William	Zimmerman, Steve
DeRose, Valerie	James, Dyann	Shuman, Ann	
DiSalvo, Vincent	Kearns,Karen	Skapura, Lisa	
Donofrio, Marijean	Knodel, Ken	Skeen, Randy	
Dornack, Rene	Libby, Steve		

The hearing Officer, so appointed by the Summit County Executive James B. McCarthy has requested a closing statement.

In her request, as learned member of the legal community, she legitimately asked the statement be couched in the rule of law.

And so it shall be.

Like a laser beam, consisting of various elements of light that come together, so too, in the focused rule of law there are elements of precedence to provide the basis for a standard of lawful behavior.

Simply, the issue is insubordination.

And the elements, surrounding an employee's right to be insubordinate, are significant to the "laser like" focus.

To draw upon my disciplinary hearing of June 1, 2006 I quoted from Gertrude Stein's 1913 poem, *Sacred Emily*, where she wrote

A rose is a rose is a rose

Does the same hold true for insubordination? I think not.

Chronology

Given: February 8, 2006 David McCann was angry with the attitudes exhibited by the Director of Finance and Budget Mrs. Linda Sowa-Phelps and her appointed deputy Brian Nelsen

Given: When the air had cleared, David McCann enthusiastically continued his duties

Given: February 14, 2006 David McCann, is handed an interpretation of events by the Director of Finance and Budget for, to quote, "the office personnel file".

Given: February 14, 2006 David McCann calls the Director of Human Resources and asks what is appropriate in responding to an interpretation with which he totally disagrees

He is told a "Memorandum for the Record" is the appropriate response

A "Memorandum for the Record" is prepared and delivered to the Human Resource Department

Given : February 15, 2006 , the following day, David McCann is called and summoned to the Director's Office; he politely makes inquiry as to the nature of the meeting.

Given: On the advice of the Director of Human Resources, he singularly attends the meeting where, he listens to the criticisms of the Director; the Deputy Director says nothing. Significant is the Director's parting comment – "If you ever question why I am calling you, I will write you up!"

Given: Filed on February 16, 2006, Mr. McCann charges the Director of Finance and Budget with sexual harassment, intimidation, and the creation of a hostile work environment

Given: ***On February 22, 2006***, with no indication as to the circumstances, David McCann is ordered to the HR department and handed a referral for anger management counseling

Given: The referral cites the following:

The Accusation	**Mr. McCann's Response**
On February 8th David became angered over my questioning of his handling of a job assignment and	The Director of Finance and Budget knew the deadline for the submission of was 4:00 PM; and the call coming at 3:25 PM expressing concern about a lined out dollar figure on the estimated amount of the bid was totaling irrelevant; particularly as all information had been submitted to Vicki Reedy
My subsequent direction of his activity	
He subsequently appeared in the hallway outside the director's secretary's office	No – I walked into the Director's Deputy's Office straightaway expressing my great displeasure and saying write me up or fire me
Yelling	No – my voiced was raised – ***and there is a difference***
And creating a disturbance	No – ***my voice was raised and I was cross***
That affected the entire office	By the time of my appearance at 3:50PM – no work activity was affected
David (McCann) has ignored offers of assistance with his workload	No such offers have ever been made
And has waited until he is overwhelmed	I have not been overwhelmed – until this date - when the Director sought to to create chaos over a non-issue
And loses his temper.	I have never once in my 18 years of service have I ever lost my temper; no profanity was used.
He does not communicate with other employees	Testimony of July 10 and 12th certainly prove otherwise
Or management.	Testimony of July 10 and 12th certainly prove otherwise

The referral asks “Has this been a re-occuring problem?

The “Yes” is circled and the question asked, “if yes, please explain:

The Accusation

Approximately three years ago David lost his temper with the Director of Finance and Budget

A few months ago David also had an exchange with the Director of Communications regarding Computer Software

Mr. McCann’s Response

Former Purchasing Director Joyce Sloan’s July 12 testimony dispels that false accusation

Mr. Rich Strain’s answer of Monday, July 10 and Mrs. Shannon Lysenko’s testimony of Wednesday, July 12 dispel that false accusation

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Given : On February 24, 2006 Mr. McCann sees a counselor regarding his alleged anger management proble***m*** (***problem, single)***. Not having enough information from the accusing parties (Linda Sowa-Phelps & Dawna "Jill" Hinig-Skapin, Mr. McCann returns for a second session, March 2, 2006 where the counselor then refers him to a medical doctor whose specialty is psychiatry for "work performance issue***s***" ***(plural)***

Mr. McCann is not aware of any work performance issues

His last performance evaluation was in August, 2003.

County Ordinance 2004-596 requires an annual job evaluation.

Given : Mr. McCann refuses to see the medical doctor whose specialty is psychiatry

Given : Mr. McCann's is given an unpaid 30 day leave for his failure to see a medical doctor whose specialty is psychiatry

Given : Mr. McCann's employment is terminated as a result of his not seeing a medical doctor whose specialty is psychiatry.

Relief

David McCann seeks reinstatement to his position as a purchasing agent with the County of Summit Purchasing Office. His reinstatement would be at his current salary (April 24, 2006), and all back pay, vacation and sick leave credit, and PERS Service Credit, and County PERS contributions for the period of time he was on unpaid administrative leave (April 24 to June 7, 2006).

Upon his reinstatement Mr. McCann would also receive back pay from May 25, 2006 to the date of his reinstatement at his current salary (April 24, 2006), vacation and sick leave credit, PERS Service Credit, and County's PERS contributions.

All benefits would be restored, to include health, dental, vision, and insurance for both Mr. McCann and his family.

He also seeks the purging and destruction of all documents (to include letters, emails, and personal notes) for the period February 8- April 24 that are critical of his work performance that are maintained by the Director, and Deputy Director of the Summit County Department of Finance and Budget, and those maintained by the Summit County Department of Human Resources, and Summit County Department of Insurance.

Mr. McCann and a representative from each department would review his file and upon a mutual agreement would purge and destroy the documents.

Additionally, all documents that are maintained by the Director, and Deputy Director of the Summit County Department of Finance and Budget, and any and all records maintained by the Summit County Department of Human Resources, and Summit County Department of Insurance, relating to his referral to the Cleveland, Ohio based Family and Children Center subsidiary Ease@Work, are to be purged and destroyed.
Mr. McCann and a representative from each department would review his file and upon a mutual agreement would purge and destroy the documents.

Background

David McCann is a male purchasing agent with the County of Summit Purchasing Office which is a partof the County Executive‘s Department of Finance and Budget. He began service with the Department of Purchasing in July, 1999 as its Business Manager.

In the year 2000, he was the County Executive‘s Employee of the Year. The award was presented to Mr. McCann by then Executive Chief of Staff Karen Margaret Doty. (Ms. Doty now serves as the Law Director for the County.)

Mr. McCann is an Ohio Certified Public Manager.

He has never been subject to any discipline since the beginning of his employment with the County of Summit. He has served at the Summit County Board of Elections 1979-1980, the Summit County Auditor (now Fiscal Office) 1981- 1988, the Summit County Department of Jobs and Family Services1994-1999, and the Department of Purchasing July, 1999 - May 24, 2006.

Definitions Garner, Bryan A. Editor in Chief. ***Black's Law Dictionary 8th ed.***

St. Paul, MN: West Group, 2004

Competency	-The mental ability to understand problems and make decisions.
Disparagement	The act or instance of castigating or detracting from the reputation of esp. unfairly or untruthfully.
Fabricate	To fabricate a story is to create a plausible version of events that is advantageous to the person relating those events. The term is softer than lie.
Insubordination	A willful disregard of an employer's instructions esp behavior that gives the employer cause to terminate a worker's employment An act of disobedience to proper authority; esp a refusal to obey an order that a superior officer is authorized to give.
(Temporal) Proximity	The quality or state of being near in time, place, order, or relation

Morris, William, ed. ***The American Heritage Dictionary of the English Language***.

Boston: Houghton Mifflin Company, 1976.

Extreme - Of the greatest severity; drastic 466

Case Law

35 AmJur 44 Disobedience of Employer‘s Rules, Instructions, or Orders

35 AmJur 45 Reasonableness of Rule or Order; Relation to Employer‘s Business Caver v Trenton

3d Cir., No. 04-2600, 8/26/05

34 Freeman v. King Pontiac Company 114 S.E. 2d 478

530 U.S. 133 (2000) 147 42 U.S.C. § 2000e-3

Burlington Northern & Santa Fe Railway Co v. White

United States Supreme Court

No. 05-259 Argued April 17, 2006 – Decided June 22, 2006

So -Why the ordered referral for Mr. McCann to an MD/psychiatrist as opposed to MA/ PhD/psychologist for the alleged ***plural problems*** of "work performance issue***s***"?

This is in sharp contract to the original order which death specifically with a referral for The ***single*** issue of "anger management".

The differences in professions, as noted, are quite telling.
MedicineNet.com

Source: http://www.medterms.com MedTerms is the Medical Dictionary of MedicineNet.com

Definition of Psychologist, clinical

Psychologist clinical: A professional specializing in diagnosing and treating diseases of the brain emotional disturbance, and behavior problems. Psychologists can only use talk therapy as treatment; you must: see a psychiatrist or other medical doctor to be treated with medication. Psychologists may have a master's (MA) or doctorate (Ph.D.) in psychology. They may also have other qualifications, including Board certification and additional training in a type of therapy.

Definition of Psychiatrist

Psychiatrist: A physician (an M.D.) who specializes in the prevention, diagnosis, and treatment of mental illness. Psychiatrists must receive additional training and serve a supervised residency in their specialty. They may also have additional training in a psychiatric specialty, such as child psychiatry or neuropsychiatry. They can prescribe medication, which psychologists cannot do. According to the American Psychiatric Association: "A psychiatrist is a physician who specializes in the diagnosis, treatment, and prevention of mental illnesses and substance use disorders. It takes many years of education and training to become a psychiatrist: He or she must graduate from college and then medical school, and go on to complete four years of residency training in the field of psychiatry. (Many psychiatrists undergo additional training so that they can further specialize in such areas as child and adolescent psychiatry, geriatric psychiatry, forensic psychiatry, psychopharmacology, and/or psychoanalysis.) This extensive medical training enables the psychiatrist to understand the body's functions and the complex relationship between emotional illness and other medical illnesses. The psychiatrist is thus the mental health professional and physician best qualified to distinguish between physical and psychological causes of both mental and physical distress."

The use of termination from employment for "work performance issues" also is a reason for the denial of unemployment benefits through the Ohio Department of Jobs and Family Services.

Matter of Law

Master- Servant

What is the tradition of the term master-servant? In the 21st Century is the master-servant definition still the logic as that expressed by 19th Century poet Alfred Lord Tennyson?

Wrote Tennyson

Theirs not to make reply,
Theirs not to reason why,
Theirs but to do & die,

Yet, since those words were first written, œ much has changed in the work place, or so we hope.

So to the matter of master servant, let us reference 35 AmJu 45

§ 44. Disobedience of Employer's Rules, Instructions, or Orders.–Among the fundamental duties of the employee is the obligation to yield obedience to all reasonable rules, orders, and instructions of the employer,[14] and willful or intentional disobedience thereof, as a general rule, justifies a rescission of the contract of service and the peremptory dismissal of the employee, whether the disobedience consists in a disregard of the express provisions of the contract, general rules or instructions, or particular commands.

Changes in the definition of Master-Servant

But the 20th Century found change in the relationship between master and servant as witnessed by the following passage

In Mitchell v. Toale, 25 S.C. 238, the Court quoted with approval the following: "The servant is bound to obey all the master's lawful and reasonable commands, even though such commands may, under the circumstances seem harsh and severe but the master has a right to manage his own affairs, and it ***must be a very extreme case in which a servant would be justified in refusing obedience to his orders.***" (Emphasis added)

114 S.E. 2d 478

So what constitutes extreme?

Extreme - Of the greatest severity; drastic (American Heritage 466)

In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.

530 U.S. 133 (2000) 147

Is it extreme, then, to contest falsity?

Is it extreme, then, to contest fabrication and disparagement of a person's character?

—In determining whether the conduct at issue is sufficiently extreme, we consider the —Totality of the circumstances

Caver v Trenton 3d Cir., No. 04-2600, 8/26/05 34

Is it extreme, then, to refuse psychiatric treatment because political appointees would seek to discredit Mr. McCann‘s filing with the Ohio Civil Rights Commission?

Is it extreme, then, to contest a referral that will forever appear on Mr. McCann‘s medical record?

Is it extreme, then, to contest a referral that could Mr. McCann‘s ability to secure insurance for both he and his family?

And is it extreme to contest Mr. McCann‘s termination based on —“insubordination for his failure to see a psychiatrist” and how that impacts his ability to secure employment in his chosen profession/government service?

Is he to lie on employment applications? Employment Space -Reason for Leaving

Mr. McCann writes —Fired for Insubordination for failing to see a psychiatrist.

Employer asks —“Why were you asked to see a psychiatrist?”

Mr. McCann replies —There were two County employees, with the consent of the County‘s Law Director, who concocted charges to discredit me, because of my filing complaints with the Ohio Civil Rights Commission.”

McCann might go on to say, —“And while the two accusing parties were offered an opportunity to elaborate on their charges against me, they chose not to.”

—“So, as the counselor sought further elaboration, and none was provided, instead of the counselor dismissing the charges, the counselor referred me to a psychiatrist as a means, as I see it, of embarking on a —“fishing expedition”.

—“A fishing expedition for what?” asks the potential employer

.—“Honestly?” —To discredit me mentally -for filing a civil rights complaint against political appointees.”

35 AmJur 45 Reasonableness of Rule or Order; Relation to Employer‘s Business § 45. –Reasonableness of Rule or Order; Relation to Employer's Business.

rules, instructions, or commands in order to be the ground for discharge on the score of disobedience, ***must be reasonable and lawful (emphasis added)***

In light of Mr. McCann‘s filing with the Ohio Civil Rights Commission; is it considered a lawful and reasonable command to refer Mr. McCann to a psychiatrist?

What was the goal?

Is it lawful to harass, intimidate, and otherwise create a hostile work environment against an individual who has filed a complaint with the Ohio Civil Rights Commission?

And the Office of the Summit County Executive knowing full well of Mr. McCann’s filing 12 separate complaints with the Ohio Civil Rights Commission chose to ignore his protected status.

Instead, they heaped more and more harassment and intimidation upon him.

42 USC 2000e-3

√ David McCann engaged in a lawful activity protected by Title VII

√ The exercise of Mr. McCann‘s civil rights was known to the charging parties

√ The charging parties, the Law Director and the County Executive took an employment action adverse to Mr. McCann (mandatory psychiatric testing or termination for insubordination œ based upon fabrications)

√ There was a connection between the protected activity (filing with the Ohio Civil Rights Commission) and the adverse employment action (mandatory psychiatric testing on the basis of false charges and a 30 day unpaid administrative leave)

Justice Stephen Breyer in his recent opinion for the United States Supreme Court **(Burlington Northern & Santa Fe Railway Co. v. White**) wrote:

“The anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm.”

And injury and harm have been brought upon Mr. McCann.

To the Hearing Officer of the County of Summit: Attorney Lisa Okolish Miller the traditions of your alma mater Ashland University and the University of Akron School of Law are well known throughout the world. With the academic power you possess and now, in your position as Chair of the Board of Trustees of Ashland University, you are truly in a position to shape and determine destinies.

Regardless of any of my personal feelings about political appointees of the Administration, I have served this Administration with vigor and great enthusiasm.

Testimony, offered by both classified employees, classified managers, unclassified employees, and unclassified managers, shows the extent of my desire to be of service to the people of Summit County.

With that, you are left with this:

Veritas est justitiae mater

Veritas, Attorney Lisa Okolish Miller, veritas.